No. 13,840

United States Court of Appeals

For the Ninth Circuit

CAPITOL CHEVROLET COMPANY, a corporation,

Appellant,

vs.

LAWRENCE WAREHOUSE COMPANY, a corporation,

Appellee.

JAMES A. KENYON, ADAMS SERVICE CO., a corporation, F. NORMAN PHELPS and ALICE PHELPS,

Appellants,

vs.

LAWRENCE WAREHOUSE COMPANY, a corporation,

Appellee.

BRIEF FOR APPELLANT CAPITOL CHEVROLET COMPANY.

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BRIEF FOR APPELLANT CAPITOL CHEVROLET COMPANY.

JURISDICTIONAL STATEMENT.

An action, Civil Action No. 23171, was commenced on February 16, 1944, by the Defense Supplies Corporation, an agency of the United States in which the Government of the United States owned more than one half the capital stock, against Lawrence Warehouse Company, Capitol

Chevrolet Company, a California corporation, Clyde W. Henry, Constantine Parella, V. J. McGrew and Charles Elmore. More than $3,000 was involved in the controversy. The foregoing averments are contained in the complaint, Paragraphs I and II (R. 3-4 of 11418). The jurisdiction of the District Court of the claim of Defense Supplies Corporation is founded on 28 United States Code, sections 1331, 1345 and 1349.

The cross-claim of Lawrence Warehouse Company against Capitol Chevrolet Company, Clyde W. Henry and Constantine Parella, as well as other cross-claims not directly involved in this appeal, were filed in the same action (No. 23171) as that in which the complaint of Defense Supplies Corporation was filed. The cross-claim of Lawrence Warehouse Company against Capitol Chevrolet Company is the claim involved in this appeal. These cross-claims were filed pursuant to Rule 13(g), Federal Rules of Civil Procedure, and arose out of the same transaction or occurrence, i.e., the destruction of certain tires averred to belong to Defense Supplies Corporation, that was the subject matter of the complaint of Defense Supplies Corporation and are ancillary to the complaint (R. 45-48 in 11418).

Coastal Air Lines v. Dockery, 180 F.2d 874 (8th Cir. 1950);

Lawrence v. Great Northern Ry. Co., 98 F.Supp. 746 (D.C.Minn. 1951);

United States Fidelity & Guaranty Co., v. Janich, 3 F.R.D. 16 at 19 (S.D. Cal. 1943).

The cross-claim of Lawrence Warehouse Company in No. 23171 was consolidated for trial with its cross-claims

in No. 30473. A judgment in favor of Lawrence Warehouse Company in both actions was "entered" on February 12, 1953. On March 10, 1953, Capitol Chevrolet Company filed its appeal from that judgment.

No judgment has been entered determining Lawrence Warehouse Company's cross-claims in No. 23171 against Clyde W. Henry and Constantine Parella. Similarly, there has been no determination of the cross-claims of Capitol Chevrolet Company against the same parties. Nor has there been a determination under Rule 54(b), Federal Rules of Civil Procedure, that there is no just reason for delay in entering the judgment appealed from and a direction for its entry.*

Capitol Chevrolet Company suggests, therefore, on this appeal, that under section 1291, 28 United States Code, its appeal might be dismissed. This anomalous suggestion of Capitol Chevrolet Company as appellant results from the District Court's holding that the judgment in No. 23171 against Capitol Chevrolet Company, made simultaneously and in one document with the judgment against cross-defendants in No. 30473, was binding on the defendants in No. 30473 and was in fact the basis for the judgment in No. 30473 (R. 29 in 13840). Defendants and appellants in No. 30473 contend that the judgment against Capitol Chevrolet Company in No. 23171 was not final and therefore not *res adjudicata* or an estoppel as to them. The court below having held to the contrary, appellants in No. 30473 (who were not defending for Capitol Chevrolet Company and did not appear at the trial of the com-

*Such determination and direction were entered in No. 30473 (R. 179 in 13840).

plaint of Defense Supplies Corporation) have no alternative but to prosecute this appeal in behalf of Capitol Chevrolet Company to obtain the reversal of the judgment on the merits, thereby reversing the judgment against them in No. 30473.

Of course, if the Court of Appeals dismisses this appeal for the reason that the judgment against Capitol Chevrolet Company is not final, the judgment against appellants in No. 30473 must be reversed, the basis for that judgment disappearing.

STATEMENT OF THE CASE.

The principal questions for decision in this case are:

1. Whether the judgment appealed from can be a final judgment when it appears that additional claims in the same action have not been adjudicated and that no determination and no direction under Rule 54(b) have been made.

2. Whether the District Court's findings are "clearly erroneous," the findings being to the effect that appellee's negligence did not contribute to the loss for which it was awarded indemnification.

3. Whether the District Court could ignore the judicial admissions of appellee and the prior judicial determination against appellee that appellee's negligence contributed to the loss for which it was awarded indemnification.

4. Whether the District Court deprived appellant of its day in court on the issues raised in appellee's cross-claim by admitting in evidence in the trial of the cross-

claim and considering on those issues evidence which had been adduced on a separate trial in the same action of different and distinct issues raised by the complaint of Defense Supplies Corporation and answers thereto of appellant, appellee and others.

On October 1, 1942, Lawrence Warehouse Company (hereinafter called "Lawrence") and Capitol Chevrolet Company (hereinafter called "Capitol") entered into an agency agreement for the storage of automobile tires and tubes (Ex. 11, R. 341 in 11418). In this agreement Capitol agreed:

> "3. To store and safeguard the storage of such tires and tubes as are received by Agent [Capitol].
> * * * * * * *
> 8. To indemnify the Principal [Lawrence] against loss or damage resulting from a failure on the part of the Agent to perform any of the duties or obligations above set forth."

Thereafter Capitol stored the tires delivered to it by Lawrence and belonging to Defense Supplies Corporation in eleven different warehouses belonging to Capitol in Sacramento (R. 110 in 11418; R. 362 in 13840). On March 1, 1943, Lawrence and Defense Supplies Corporation entered into a new agreement for the storage of tires in a building called the Ice Palace (Ex. 1, R. 310 et seq. in 11418). On March 1, 1943, under Lawrence's direction Capitol entered into a lease of the Ice Palace from Clyde W. Henry, its owner (Ex. 6, R. 321 et seq. in 11418) and subsequent thereto removed some of the tires and tubes of Defense Supplies Corporation to the Ice Palace. Watchmen were maintained for the Ice Palace by

Lawrence (R. 351-352; 365-366 in 13840). On April 9, 1943, V. J. McGrew, an independent contractor, commenced use of an acetylene torch in an engine room adjacent to the Ice Palace to the knowledge of the watchmen (R. 280-281 in 11418). As a result of McGrew's negligent use of the acetylene torch the Ice Palace burned destroying the tires and tubes.

On May 31, 1943, the stockholders of Capitol, who were James A. Kenyon and Adams Service Co., a corporation,* authorized its dissolution and agreed that upon the transfer to them of its assets, they would assume its liabilities (R. 159, 162 in 13840).

On June 1, 1943, Capitol filed its Certificate of Election to Dissolve with the Secretary of State (R. 357-359 in 13840). Prior to December 31, 1943, the assets of Capitol were distributed to its stockholders, James A. Kenyon and Adams Service Co., and on that date Capitol's Certificate of Winding Up and Dissolution was executed (R. 357-359 in 13840).

On February 16, 1944, Defense Supplies Corporation filed its claim in action No. 23171 for the loss of the tires and tubes against Lawrence, Capitol, Clyde W. Henry, Constantine Parella, V. J. McGrew and Charles Elmore (R. 3 et seq. in 11418). It was averred that Capitol and Lawrence permitted V. J. McGrew to enter the premises with an acetylene torch (R. 8-9 in 11418). On May 8, 1944, Lawrence filed its answer to the complaint denying liabil-

*James A. Kenyon and Adams Service Co. are appellants and defendants in No. 30473. F. Norman Phelps and Alice Phelps, also defendants and appellants in No. 30473, are the stockholders of Adams Service Co. and were held liable for its obligations.

ity and its cross-claim against Clyde W. Henry, Constantine Parella and Capitol in which it sought judgment over for any liability which might be imposed upon it by reason of the complaint of Defense Supplies Corporation (R. 38 et seq. in 11418). On April 14, 1944, Capitol filed its answer to the complaint denying liability and its cross-claims against Clyde W. Henry and Constantine Parella in which it sought judgment over for any liability which might be imposed on it by reason of the complaint of Defense Supplies Corporation (R. 10 et seq. in 11418). On May 18, 1944, Capitol filed its answer to the cross-claim of Lawrence denying any duty to indemnify Lawrence (R. 353-354 in 13840). Thereafter Constantine Parella and Clyde W. Henry filed their answers to the cross-claims of Lawrence and Capitol (R. 4 in 13840).

On February 13, 1945, to and including February 15, 1945, a trial occurred at which plaintiff Defense Supplies Corporation and defendants Lawrence, Capitol, Henry, Elmore, Parella and McGrew appeared. Capitol was represented by Attorneys A. J. Getz, Esq., and Cameron B. Aikens, Esq. (R. 60 in 11418). At the close of plaintiff's case all the defendants moved to dismiss (R. 308-309 in 11418) and the case was submitted on said motions (R. 309 in 11418). Plaintiff did not oppose Parella's motion to dismiss, and it was granted.

At the trial on February 13, 1945, James A. Kenyon was called as a witness for plaintiff under Rule 43(b), Federal Rules of Civil Procedure. According to his testimony and a statement there made by his attorney in the presence of the attorney for Lawrence, Capitol had theretofore been dissolved (R. 354-356 in 13840).

On January 9, 1946, the Court rendered its opinion (67 F.Supp. 16) to the effect that judgment be entered in favor of plaintiff against defendants Lawrence, Capitol and McGrew and in favor of defendant Henry against plaintiff for costs. In this opinion the court stated (R. 75 in 11418):

> "The Court will retain jurisdiction to determine the issues of the cross-actions, if the parties therein concerned determine to pursue the same."

On February 20, 1946, the Court made substantially the following order (R. 4 in 13840):

> "Feb. 20, 1946.
>
> Goodman, J. ordered findings prepared in main case; further ordered hearing on cross-complaints dropped from calendar to be restored on motion of interested parties."

On April 15, 1946, the court filed written Findings of Fact and Conclusions of Law and rendered a judgment in accordance with its opinion. The judgment was against Lawrence, Capitol and McGrew, jointly and severally (R. 83-84 in 11418).

Lawrence and Capitol appealed from this judgment and the judgment was affirmed on appeal (*Lawrence Warehouse Co. v. Defense Supplies Corporation,* 164 F. 2d 773 (9th Cir. 1947)).* Subsequently, Lawrence and Capitol moved the Court of Appeals to vacate the affirmance and to remand the action to the District Court with instructions to dismiss. The ground of the motion

*The record on that appeal, No. 11418, has by stipulation and order been made a part of the record on this appeal, No. 13840 (R. 442-444 in 13840).

was that Defense Supplies Corporation had been dissolved on June 30, 1945, and hence, when the District Court had rendered judgment on April 14, 1946, it had lost its jurisdiction. This motion was granted by the Court of Appeals (*Lawrence Warehouse Co. v. Defense Supplies Corporation,* 168 F. 2d 199 (9th Cir. 1948)). On certiorari, the Supreme Court held that, while the appeal from the judgment of the District Court had abated on July 2, 1946, the judgment was valid when entered and could be sued upon by the successor of Defense Supplies Corporation, the Reconstruction Finance Corporation (*Defense Supplies Corp. v. Lawrence Warehouse Co.,* 336 U.S. 631 (1949)).

On April 12, 1951, Reconstruction Finance Corporation filed its complaint in No. 30473 against Capitol Chevrolet Company, Lawrence Warehouse Company, James A. Kenyon, Capitol Chevrolet Co. (to be distinguished from Capitol Chevrolet Company), V. J. McGrew and Seaboard Surety Company, the surety on Lawrence's supersedeas bond in No. 23171 (R. 38 et seq. in 13840). The complaint in No. 30473 was based on the judgment in No. 23171; James A. Kenyon and Capitol Chevrolet Co. were averred to be liable for the obligations of Capitol Chevrolet Company (R. 41-43 in 13840). In the second action, No. 30473, Lawrence again cross-claimed against Capitol Chevrolet Company and against James A. Kenyon and Capitol Chevrolet Co. (R. 55 et seq. in 13840). Capitol Chevrolet Company, James A. Kenyon and Capitol Chevrolet Co. denied liability on the claim of Reconstruction Finance Corporation (R. 45 et seq. in 13840) and on the cross-claims of Lawrence (R. 98 et seq. in 13840).

On March 7, 1951, H. C. Alphson, Esq., and Dempsey, Thayer, Deibert & Kumler were substituted as attorneys for Capitol in No. 23171 (R. 4 in 13840).

On November 20, 1951, the court granted summary judgment in favor of Reconstruction Finance Corporation in No. 30473 against Lawrence, Seaboard Surety Company, V. J. McGrew and Capitol Chevrolet Company, jointly and severally, in the amount of the judgment in favor of Defense Supplies Corporation ($42,171.70) plus interest and costs (R. 81-83 in 13840).

On February 15, 1953, Lawrence filed an amendment to its cross-claim in No. 30473 naming as additional cross-defendants Adams Service Co., J.A.K. Co., F. Norman Phelps and Alice Phelps (R. 113 et seq. in 13840). F. Norman Phelps and Alice Phelps filed their answers to this cross-claim on March 5, 1952 (R. 147 et seq. in 13840), and while it has been contended that Adams Service Co. was neither served nor appeared, the court held that Adams Service Co. appeared and defended on the merits (R. 134-136 in 13840). No question is raised on this issue in the appeal of Adams Service Co.

On March 4, 1952, on motion of Lawrence and in confirmation of a minute order entered on January 9, 1952, the court ordered that the "above-captioned actions [No. 23171 and No. 30473] be consolidated for trial on March 5, 1952" (R. 18 in 13840).

On March 3, 1952, Capitol filed its first amended answer to the cross-claim of Lawrence in No. 23171 denying liability and setting up affirmative defenses based on the acquiescence and contributory negligence of Lawrence (R.

10 in 13840). On this appeal it is urged that the court erred in finding that Capitol breached any duty to Lawrence and in not finding in favor of the affirmative defenses.

At the consolidated trial of the cross-claims, Lawrence introduced no evidence on the issue of whether its liability to Defense Supplies Corporation or to Reconstruction Finance Corporation, was caused by some breach of duty by Capitol to Lawrence other than the evidence which had been previously introduced at the trial of the claim of Defense Supplies Corporation on February 13, 1945, to and including February 15, 1945 (R. 316-317 in 13840).* Objection was made to the admission and consideration of this evidence at that time (R. 317 et seq. in 13840) and, pursuant to stipulation, the court at that trial reserved to Capitol leave to file a motion to strike all said evidence (R. 322, 323 in 13840). This motion was filed (R. 19 et seq. in 13840) and was apparently denied (Order for Judgment, R. 29 in 13840; Conclusions, R. 130 in 13840) although the court did not observe that the motion was made by Capitol (Conclusions, R. 130 in 13840). It is urged on this appeal that the court erred in admitting and considering this evidence.

On September 12, 1952, the court entered its order for judgment in favor of Lawrence on its cross-claim in No. 23171 against Capitol (R. 24 et seq. in 13840). In No. 30473 it ordered judgment in favor of Lawrence on its cross-claims against James A. Kenyon and Adams Service

*This evidence was not offered against the cross-defendants in No. 30473.

Co. but ordered the cross-claims dismissed as to F. Norman Phelps, Alice Phelps, Capitol Chevrolet Company, J.A.K. Co. and Capitol Chevrolet Co. (R. 24 et seq. in 13840). On January 15, 1953, it amended its order for judgment by ordering judgment in favor of Lawrence in No. 30473 against F. Norman Phelps and Alice Phelps (R. 30 et seq. in 13840).

On February 11, 1953, Findings of Fact and Conclusions of Law were filed as one document entitled in both actions, No. 23171 and No. 30473 (R. 117 et seq. in 13840). A judgment also entitled in both actions was filed on February 11, 1953, in favor of Lawrence against Capitol (in No. 23171) for the sum of $76,269.73 representing the amount paid by Lawrence to Reconstruction Finance Corporation, Lawrence's costs and attorneys' fees, and interest (R. 131 et seq. in 13840). It is from this judgment that this appeal is taken (R. 33 in 13840).

SPECIFICATION OF ERRORS.

1. The Judgment, Findings of Fact (Findings, Nos. V, VI, VII, XIII, XVII, XVIII, XIX, XX, XXII, and XXIII, R. 119 et seq. in 13840), and Conclusions of Law (Conclusions, Nos. I and II, R. 128-130 in 13840) are unsupported by the evidence and are clearly erroneous because:

(a) The evidence admitted and considered by the Court clearly shows that any negligence of Capitol to Defense Supplies Corporation was known to and expressly directed by Lawrence;

(b) The evidence admitted and considered by the Court clearly shows that Lawrence's action of admitting McGrew to the Ice Palace and permitting the use of an acetylene torch therein was independent active negligence which was the proximate cause of the damage to Defense Supplies Corporation.

2. The Court erred in failing to hold that the Judgment, Findings of Fact and Conclusions of Law rendered on the complaint of Defense Supplies Corporation are binding on Lawrence and demonstrate that Lawrence was actively negligent (Answer, R. 16-17 in 13840; Findings, No. XVI, R. 126 in 13840).

3. It was error to admit or to consider as evidence at the trial of the cross-claim of Lawrence the transcript of evidence and exhibits adduced at the trial of the complaint of Defense Supplies Corporation.

(This evidence is not here set out in full because it consists of practically the whole of the record on the former appeal in Action No. 23171. This evidence was reoffered at the trial of the cross-claims (R. 317 in 13840), but the Court may have considered this evidence to have been in the case on the issues raised in the cross-claim when originally offered (R. 29, 117). This was the *only* evidence offered to show that Capitol breached some duty to Lawrence.)

The grounds of objection to said evidence urged at the trial and in a motion to strike were the following (R. 317 et seq. in 13840; Motion to Strike, R. 19 et seq. in 13840):

(a) The evidence adduced at the trial of the complaint of Defense Supplies Corporation in No. 23171

was limited, in so far as Capitol was concerned, solely to the issue of whether Capitol failed to perform some duty owed to Defense Supplies Corporation.

1. The Court made a judicial record on and final determination of this issue by its Judgment of April 15, 1946, and its Findings of Fact and Conclusions of Law of April 15, 1946.

(b) The evidence adduced at the trial of the complaint of Defense Supplies Corporation in No. 23171 cannot be utilized to show that Capitol failed to perform some duty it may have owed to Lawrence.

1. Evidence in a former trial is admissible against a party only if the party had the right to cross-examine on the issue in regard to which the evidence is offered.

(c) The evidence adduced at the trial of the complaint of Defense Supplies Corporation in No. 23171 cannot be introduced on the issue as to which it was originally offered because on that issue the Court has made a final determination.

1. A judicial record is the "best evidence" of a judicial determination.

2. The evidence adduced at the trial of the complaint of Lawrence in No. 23171 is "integrated" in a judicial record.

3. An unambiguous judicial record cannot be modified by extrinsic evidence.

4. A judicial record cannot be contradicted by extrinsic evidence that something different was intended.

5. A party who relies on a judicial record cannot impeach its recitals.

(d) The evidence offered at the trial of the complaint of Defense Supplies Corporation in No. 23171 is incompetent and inadmissible hearsay where now offered by Lawrence on the issues raised by the cross-claims and the answers of the cross-defendant.

1. Under California law to use the transcript of testimony at a former trial it is necessary to establish the unavailability of the witnesses whose testimony appears in the transcript.

2. Under Federal law the transcript of testimony given at a former trial is admissible, *if at all,* only where the unavailability of the witnesses whose testimony appears in the transcript is established.

4. The Court erred in finding (Findings, No. X, R. 123 in 13840) that on November 21, 1951, Reconstruction Finance Corporation recovered judgment against cross-claimant Lawrence and cross-defendant Capitol in the amount of $42,171.70 plus interest at the rate of 7 per cent per annum from April 15, 1946, to and including November 21, 1951, and costs in the amount of $20.00, and in finding (Findings, No. XI, R. 123 in 13840) that on or about December 1, 1951, while said judgment was still in force and unsatisfied, cross-claimant, Lawrence, paid plaintiff Reconstruction Finance Corporation the

sum of $58,859.90 in full satisfaction and discharge of said judgment in favor of said plaintiff because:

(a) Said judgment was not, and is not now, final but is subject to revision at any time, inasmuch as all the claims in Action No. 30473 have not been disposed of;

(b) No evidence was offered or admitted to show that the judgment in Civil Action No. 30473 in favor of Reconstruction Finance Corporation was based on the judgment in favor of Defense Supplies Corporation in Civil Action No. 23171, or that said judgment in Civil Action No. 30473 was paid by Lawrence.

5. For the foregoing reasons the Court erred in granting judgment in favor of Lawrence and in refusing to grant judgment in favor of Capitol (Conclusion, No. I, R. 128-129 in 13840).

SUMMARY OF ARGUMENT.

I. Unresolved doubt about the jurisdiction of this Court over this appeal prompts appellant to realize and suggest that this appeal might be dismissed.

II. The evidence precludes recovery by Lawrence Warehouse Company from Capitol Chevrolet Company.

A. It is not sufficient to show merely that Lawrence incurred a liability to Defense Supplies Corporation.

B. Any negligence of Capitol was known to and expressly directed by Lawrence.

(Lawrence expressly directed Capitol to remove the tires and tubes from Capitol's warehouses to the Ice Palace knowing of its fire hazards. Capitol had no knowledge of McGrew's entry or use of an acetylene torch.)

C. The independent active negligence of Lawrence caused the damage to Defense Supplies Corporation.

(The evidence and judicial admissions by Lawrence in its pleadings and by its counsel demonstrate that Lawrence employed and regularly maintained the watchmen who permitted and observed McGrew's entry with an acetylene torch.)

III. The Judgment and the Findings of Fact and Conclusions of Law rendered on the complaint of Defense Supplies Corporation are binding on Lawrence Warehouse Company and demonstrate that Lawrence Warehouse Company was actively negligent.

A. In so far as Lawrence was concerned the ground of its liability (upon which depended its right to indemnity) was placed in issue, as a matter of law and as a matter of pleading, between Lawrence and Defense Supplies Corporation at the trial of the complaint in Action No. 23171.

B. The judicial record of the trial of the complaint in Action No. 23171 is conclusive on Lawrence.

IV. It was error to admit or to consider as evidence at the trial of the cross-claim of Lawrence Warehouse Company the transcript of evidence adduced at the trial of the complaint of Defense Supplies Corporation.

A. The evidence was not admissible and could not be considered to show that Capitol breached some duty to Lawrence.

B. The evidence was not admissible to show an alleged "true meaning" of the Judgment and Findings of Fact and Conclusions of Law.

V. Lawrence failed to prove any loss or damage.

(No evidence of payment of the judgments in favor of Defense Supplies Corporation or Reconstruction Finance Corporation was admitted. The judgment in favor of Reconstruction Finance Corporation is not final.)

ARGUMENT.

I. UNRESOLVED DOUBT ABOUT THE JURISDICTION OF THIS COURT OVER THIS APPEAL PROMPTS APPELLANT TO REALIZE AND SUGGEST THAT THIS APPEAL MIGHT BE DISMISSED.

The record shows that in Action No. 23171 Lawrence filed cross-claims against Clyde W. Henry and Constantine Parella (R. 45, et seq. in 11418) and that these cross-defendants filed answers to these cross-claims (R. 4 in 13840). Similarly, Capitol filed cross-claims against Clyde W. Henry and Constantine Parella which were answered (R. 4-5 in 13840). No adjudication of these cross-claims has been made; the only judgments rendered in the action do not refer to them (R. 83 in 11418; R. 81, 131 in 13840). Thus, under Rule 54(b), Federal Rules of Civil Procedure,

the judgment in Action No. 23171 from which this appeal is taken may not be final.

Kam Koon Wan v. E. E. Black, Limited, 182 F.2d 146 (9th Cir. 1950).

Although this action was commenced prior to March 19, 1948, the effective date of the amendment to Rule 54(b), the judgment from which this appeal is taken was rendered on January 11, 1953 (R. 131 in 13840). This Court and the Court of Appeals for the Second Circuit have held that Rule 54(b), as amended, applies to a judgment rendered after the effective date of the rule even though the action was commenced before that date.

Kam Koon Wan v. E. E. Black, Limited, 182 F.2d 146 (9th Cir. 1950);

Flegenheimer v. Manitoba Sugar Co., 182 F.2d 742 (2d Cir. 1950).

See, Rule 86(b), Federal Rules of Civil Procedure.

It may be that the District Court's determination and direction pursuant to Rule 54(b), although entitled only in Action No. 30473, could be construed to apply to the judgment in Action No. 23171 (R. 179 in 13840). If it is determined that Rule 54(b) applies to the judgment from which this appeal is taken, the proper procedure is to dismiss the appeal.

Kam Koon Wan v. E. E. Black, Limited, 182 F.2d 146 (9th Cir. 1950).

Appellant Capitol raises this point because the only basis for the judgment against the cross-defendants in Action No. 30473 was this judgment against Capitol in Action No. 23171 (R. 29 in 13840). Appellants in No.

30473 contend that they cannot be bound by this judgment because it was not final at the time of trial.

Merriam v. Saalfield, 241 U.S. 22, 28 (1916).

If this judgment is not even now final, then not only must this appeal be dismissed, but the judgment against appellants in No. 30473 must be reversed.

II. THE EVIDENCE PRECLUDES RECOVERY BY LAWRENCE WAREHOUSE COMPANY FROM CAPITOL CHEVROLET COMPANY.

Appellant contends that, as a matter of law, it was error for the court to admit or consider as evidence at the trial of the cross-claim of Lawrence the evidence adduced at the trial of the complaint of Defense Supplies Corporation. This court, however, may not have to decide that point, for if that evidence is considered, it shows that Lawrence is not entitled to indemnity from Capitol.

A. IT IS NOT SUFFICIENT TO SHOW MERELY THAT LAWRENCE INCURRED A LIABILITY TO DEFENSE SUPPLIES CORPORATION.

A brief statement of the law of indemnity is necessary prior to analyzing the evidence. First, and foremost, there is no right of indemnity or contribution in California between joint tort-feasors.

Dow v. Sunset Tel. & Tel. Co., 162 Cal. 136, 121 Pac. 379 (1912).

In the agreement between Lawrence and Capitol made before Capitol stored the tires and tubes in its own warehouse (R. 341 et seq. in 11418), Capitol agreed:

"8. To indemnify the Principal against loss or damage resulting from a failure on the part of the Agent to perform any of the duties or obligations above set forth."

On its face the agreement provides for indemnity only for the acts or the failures to act of Capitol. Further, this court has held that unless the indemnitor is an insurance company, such agreements will not be construed to provide for indemnification for independent negligent acts or negligent nonaction of the indemnitee.

United States v. Wallace, 18 F. 2d 20 (9th Cir. 1927).

In fact, such an agreement would not even preclude Capitol from indemnification by Lawrence for Lawrence's wrongful acts exposing Capitol to liability.

Washington & Berkeley B. Co. v. Pennsylvania S. Co., 215 Fed. 32 (4th Cir. 1914).

The agreement between Lawrence and Capitol created the status of principal (Lawrence) and agent (Capitol). As between principal and agent the following are the rules of indemnity:

1. The principal is primarily liable to a third person and not entitled to indemnification from his agent for his own independent negligent acts.

Green v. Southern Pacific Co., 53 C.A. 194 at 201, 199 Pac. 1059 (1921), hearing in Supreme Court denied;

1 Mechem, *Agency* (2d ed. 1914) Sec. 1287.

2. The principal is primarily and jointly liable to a third person and is a joint and concurrent tort-

feasor, and not entitled to indemnification for the directed negligent acts of his agent.

Benson v. Southern Pacific Co., 177 Cal. 777, 171 Pac. 948 (1918).

3. The principal is secondarily liable and entitled to indemnification only for the undirected negligent acts of the agent done within the scope of the agent's authority.

Bradley v. Rosenthal, 154 Cal. 420 at 423, 97 Pac. 875 (1908).

4. The agent is entitled to indemnification from the principal for negligent acts of the agent directed by the principal.

Bradley v. Rosenthal, 154 Cal. 420 at 424, 97 Pac. 875 (1908);

1 Mechem, *Agency* (2d ed. 1914) Sec. 1603.

This is true even where the agent has agreed to indemnify the principal for the agent's negligent acts.

Horrabin v. City of Des Moines, 198 Iowa 549, 199 N.W. 988 (1924).

Another situation, not limited to the principal-agent relationship, arises where one party is "passively" negligent and the other is "actively" negligent. In such situations some courts require the party "actively" negligent to indemnify the party "passively" negligent. Recently this court so applied the law of Oregon.

Booth-Kelly Lumber Co. v. Southern Pacific Co., 183 F.2d 902 (9th Cir. 1950).

This rule, however, has not been adopted by the California Supreme Court and was expressly rejected in,

Dow v. Sunset Tel. & Tel. Co., 162 Cal. 136, 121 Pac. 379 (1912).

There, Justice Melvin, speaking for the court, stated (162 Cal. 138-139):

> "Both companies were liable, but appellant insists that it was only passively guilty of a tort and that therefore it comes within an exception to the general rule above stated. With this view we cannot agree. It was the separate duty of each to take thorough precautions. Any accident due to neglect of such duty made the corporations jointly liable."

and (p. 140):

> "The law being thus settled in California, we need not examine the decisions in other states, wherein the general rule which we have been discussing is given many shades of variation and exception."

It must be remembered that in analyzing the rule applied in the *Booth-Kelly Lumber Co.* case supra, this court referred to section 95 of the *Restatement of Restitution* where the rule is expressed as follows (p. 415):

> "Where a person has become liable with another for harm caused to a third person because of his negligent failure to make safe a dangerous condition of land or chattels, which was created by the misconduct of the other or which, as between the two, it was the other's duty to make safe, he is entitled to restitution from the other for expenditures properly made in the discharge of such liability, unless after discovery of the danger, he acquiesced in the continuation of the condition."

From the foregoing it is clear that, even if the law of California is not adopted, to be indemnified by Capitol Lawrence must show that the tires and tubes of Defense Supplies Corporation were destroyed by the action or nonaction of Capitol which it did not direct and in which it did not acquiesce. As a matter of defense, Capitol can show that some negligent act by Lawrence caused the destruction of the tires and tubes.

B. ANY NEGLIGENCE OF CAPITOL WAS KNOWN TO AND EXPRESSLY DIRECTED BY LAWRENCE.

There is no conflict in the evidence on this issue of fact. Most of the evidence on this issue was introduced by Capitol at the second trial on March 5, 1952. Without conflict the evidence shows that the following occurred:

After Lawrence and Capitol entered into the agency agreement for the storage of tires and tubes on October 1, 1942 (R. 341 et seq. in 11418), Capitol stored the tires and tubes delivered to it by Lawrence and belonging to Defense Supplies Corporation in eleven different warehouses in Sacramento (R. 362 in 13840). Mr. Wallace, attorney for Lawrence, stated at the trial of the complaint of Defense Supplies Corporation (R. 110 in 11418):

> "Now, in this particular Capitol Chevrolet arrangement, if my memory is correct, I think the Reconstruction Finance Corporation anticipated when this program started that there would be about 10,000 tires stored in Sacramento. Arrangements were made with the Capitol Chevrolet Company to store that comparatively small number. Prior to the time that they hired this Ice Palace they already had eleven

> warehouses in Sacramento, in every conceivable kind of a vacant space; there was something like 100,000, so it was then decided to consolidate the tires in this big building that was called the Ice Palace, and that building was used as a consolidation warehouse."

It was during this period of time that Capitol was directed to permit only employees of Defense Supplies Corporation to enter the premises (Ex. 9, R. 339-340 in 11418). Undoubtedly if the tires and tubes had been destroyed during this period the provisions of the agency agreement would have applied to make Capitol solely liable. Subsequently, however, the tires and tubes were removed to a different place of storage, the Ice Palace, at which place there was a modification of the duties of Capitol and Lawrence. This fact was irrelevant and therefore not presented on the prior appeal.

Prior to the leasing of the Ice Palace, representatives of Lawrence, Capitol and Defense Supplies Corporation inspected it and knew of its fire hazards (R. 368 et seq. in 13840). Capitol did not desire to consolidate the storage of the tires in the Ice Palace, but was directed to do so by Lawrence (R. 363-366 in 13840). Also, prior to the leasing of the Ice Palace, Lawrence undertook to maintain watchmen for the Ice Palace (R. 365-366 in 13840). On March 1, 1943, Lawrence and Defense Supplies Corporation entered into an agreement for storage of tires at the Ice Palace; Capitol was not a party to this agreement (R. 310 et seq. in 11418). On March 1, 1943, Capitol entered into a lease of the Ice Palace with Henry and Parella (Ex. 6, R. 321 et seq. in 11418). Lawrence maintained watchmen for the Ice Palace (R. 193 in 11418).

There can be no dispute as to the foregoing evidence. The following paragraph may be disputed. It relates to whether Gordon Kenyon,* an employee of Capitol, permitted or knew of McGrew's entry into the Ice Palace (Findings, No. V, R. 119 in 13840). Appellant contends that its version is supported by all the evidence and that the District Court's version was clearly erroneous. Fairness requires appellant to point out that this court stated in its opinion on the former appeal (164 F.2d 773 at 777):

> "Moreover, it was Capitol, not the guard, who permitted McGrew to enter and pursue his work in the building. Kissell's presence did not preclude vigilance on Capitol's part or, indeed, render its exercise any the less imperative since Kissell [the guard] acted in the matter under Capitol's direction and had no apparent reason to suppose that McGrew's use of the torch was unauthorized."

Henry, one of those authorized by Defense Supplies Corporation to enter the Ice Palace (Ex. 10, R. 340 in 11418), gave written authorization to Mr. Sanchez, his employee, to enter the Ice Palace and there to remove some pipe. Mr. Henry testified (R. 176-178 in 11418):

> "Q. [by Mr. Miller for Defense Supplies Corporation] What was the arrangement?
>
> A. The answers that I gave in this deposition are information that I had received from my superintendent, Mr. Sanchez, and I gave those as facts, because he had told them to me. So far as my giving either Mr. Sanchez or Mr. McGrew specific instructions to go and see some person, I did not

*Gordon Kenyon is not to be confused with James A. Kenyon, appellant in Action No. 30473.

give those specific instructions, and when you asked me if I asked Mr. Gordon Kenyon for permission to go in that Ice Palace, I did not. However, in conversation with Mr. Sanchez I understand that he went to Mr. Kenyon, whatever Mr. Kenyon was that had authority to give permission, and he received permission for Mr. McGrew to go in and get this tank out. Does than [sic] answer your question?

* * * * * * *

Mr. Miller. Q. I will call your attention again to the note that you identified reading: 'Sacramento, Calif. To Watchman at Ice Palace. Please allow bearer Mr. Tony Sanchez to enter with his two men to remove pipe and equipment.'* I will ask you again if that authorization was written by you.

A. Yes, it was.

Q. And was that for the purpose of Mr. Sanchez going to the Ice Palace to remove the machinery and and equipment from the engine room?

A. I answered that once before, but I will be glad to answer it again. That was given a week previous, at least a week previous, to this April 9, [the date of the fire] but it was given to Mr. Sanchez to give the watchman at the Ice House to take out approximately 80 feet of 12-inch casing that was in there that we wanted, but it had nothing whatever to do with the getting out of this brine tank.

Q. So it is now your testimony that you never sent anyone there to take the brine tank out?

A. That is very technical. You are trying to confuse me. I explained that at quite some length, and I will be glad to explain it again.

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*This writing was the only knowledge Capitol had of an entry into the Ice Palace. It does not mention McGrew or an acetylene torch.

The Court. I think I understand the testimony. We do not have to go over it again. We will take a recess at this time for a few minutes."

and (R. 180-181 in 11418):

"Mr. Glicksberg [for defendants Henry and Elmore, lessors of Ice Palace]. Q. Just one or two questions. Mr. Henry, all of these questions propounded to you by counsel pertaining to the deposition and the answers you gave therein, were they correct?

A. Well, both answers are correct, as far as I know.

Q. What do you mean by 'both answers are correct'?

A. I mean if there is any variance between the answers that I gave in that deposition and the answers I gave here, they are largely technical, because after some of the technical points brought out this morning I wondered if I had given the right answers when I said as a fact in my deposition information that had been given me.

Q. But a great many of those questions were directed to your giving of a card. Did that card have anything to do with any of the subject matter of the case at the time of the fire?

A. No.

Q. All of the answers which pertain to your giving of a card and permission of individuals to go in had to do with some other subject?

A. The card was given to Mr. Sanchez so that he could take his men and go and get a length of 12-inch pipe out of there for the use of the water company, and it had nothing whatever to do with Mr. McGrew entering the premises.

Q. And all of the answers that were read by counsel pertained to that particular card and that section of 12-inch pipe?

A. That is correct."

On a different occasion Henry orally authorized V. J. McGrew, an independent contractor, to enter the engine room of the Ice Palace and there to remove a brine tank. Henry testified (R. 165-168 in 11418):

"Mr. Miller. Q. On or about April 9, 1942, or shortly before that date, did you send a Mr. McGrew to the Ice Palace to take out a bronze tank in this engine room?

A. You mean 1942 or 1943?

Q. 1943?

A. No, I did not.

Q. What was your relationship with Mr. McGrew?

A. Mr. McGrew was a contractor whom I had employed over a period of about eight years drilling wells for me.

Q. Was he working for you in April, 1943?

A. He had a contract with me in April, 1943.

Q. What was that contract for?

A. For drilling wells.

Q. Do you know a Mr. Sanchez?

A. Yes.

Q. Does Mr. Sanchez work for you?

A. Yes.

Q. Do you know a Mr. Elmore?

A. Yes.

Q. Did Mr. Sanchez and Mr. Elmore both work for you in April, 1943?

A. Yes.

Q. Did you send either one or both of those men to the Ice Palace to remove this brine tank?

A. No.

Q. Did you send anyone there to remove the brine tank?

A. No.

Q. Did you request Capitol Chevrolet Company for permission for anyone to go upon these premises and remove this brine tank?

A. No.

Q. Did you send Mr. Sanchez down to the Capitol Chevrolet Company with a card from you asking that he be permitted to go upon the premises and remove machinery and equipment, or the brine tank?

A. No.

Q. Do you ever recall writing a note or memorandum which reads, 'Sacramento, Calif. To Watchman at Ice Palace. Please allow bearer, Mr. Tony Sanchez, to enter with his two men to remove pipe and equipment.'?

A. Yes, I remember writing that card.

Q. Did you give that card to Mr. Sanchez?

A. Yes, I did.

Q. Did you then send him to the Ice Palace?

A. I directed him to go to the Ice Palace with that card.

Q. With that card?

A. Yes.

Q. And the two men that you mention in that card were Mr. Elmore and Mr. McGrew?

A. Mentioned in what?

Q. In this writing in which you state, 'Please allow bearer, Mr. Tony Sanchez, to enter with his two men.'

A. No.

Q. What two men did that refer to?

A. The two men that Mr. Sanchez might have had.

Q. Mr. Sanchez was at that time employed by you?

A. That is right.

Q. What was his position with you?

A. Superintendent of the waterworks.

Mr. Glicksberg. At this time may we have a foundation laid as to the time and place of this card? I think it is quite material.

The Court. All right. I thought he had asked that.

Mr. Glicksberg. Not as to the time it was given.

Mr. Miller. Q. I will ask you now, Mr. Henry, when was that card given Mr. Sanchez?

A. Oh, I would say probably around April 1, as close as I could estimate.

Q. Of 1943?

A. That is correct.

Q. Do you know if Mr. Sanchez went to the Ice Palace?

The Court. I think the witness said a moment ago he did not give the card, and then he changed his testimony.

Mr. Glicksberg. No, I do not think there is any such thing as the witness changing his testimony.

The Court. He may have misunderstood the other question.

Mr. Glicksberg. That is why I asked to have the foundation laid. I thought myself counsel was directing the witness' attention to a day prior to the fire. It might have been a week or ten days prior thereto.

Mr. Miller. Q. Then it is your testimony that on or about April 1, 1943 you sent Mr. Sanchez down to the Ice Palace to remove the machinery and equipment from the engine room; is that correct?

A. That is not correct. I sent Mr. Sanchez about April 1 to get a pipe out of the Ice Palace.

Q. Did you ever send Mr. Sanchez down to take anything out of the engine room?

A. No.

Q. Did you ever send Mr. McGrew down to take anything out of the engine room?

A. No.

Q. Did you ever make any arrangement with Mr. McGrew to remove the tank from the engine room?

A. I will have to answer that question by explaining the circumstances."

Gordon Kenyon was presented with only one request to enter the Ice Palace, whether written or oral, and that request was the written request above referred to. Gordon Kenyon's testimony was as follows (R. 185-189 in 11418):

"Q. [by Mr. Miller for Defense Supplies Corporation] Were you assistant manager of the Capitol Chevrolet Company in April 1943?

A. Yes.

Q. Do you recall, Mr. Kenyon, giving authority to anyone to go upon the premises known as the Ice Palace in west Sacramento to remove any machinery or equipment therefrom?

A. I at one time recall a Mr. McGrew asking for permission, asking me to O.K. permission to enter property, to go into the Ice Palace.

Q. Do you recall the name of the person who sent you that card?

A. I think the card was from Clyde Henry—it was signed by Mr. Henry.

Mr. Miller. Do you happen to have the original of that card?

Mr. Getz [for Capitol] I have it, counsel. I will produce it in just a moment.

Mr. Miller. I wish to proceed with some questions while you are looking at it.

Q. Did you know the man who presented you with that card?

A. I did not.

Q. Do you remember the name of the man who came to you with the card?

A. The card showed the man's name was Mr. Sanchez.

Q. You didn't know Mr. Sanchez otherwise?

A. No.

Q. Did you instruct the guard at the Ice Palace to permit Mr. Sanchez to go into the premises and remove any equipment?

A. I think I did. I can't be positive.

The Court. Q. You mean you don't recall distinctly?

A. I don't recall distinctly, no. Let me put it this way: I do not recall how I gave him authority to go in, whether it was by telephone or by written correspondence.

Q. Either one way or the other?

A. I did it one way or the other.

By Mr. Miller:

Q. When you say 'one way or the other,' you mean you don't recall whether it was written or oral?

A. That is right.

Q. Do you know if the man went out to the Ice Palace and went into the engine room and removed any equipment?

A. Lately, you mean?

Q. After you gave him authority to enter or instructed the guard to let him enter, do you know if he went there?

A. Just by hearsay.

Q. I will show you this—it is a business card of the U. S. Machinery Company, and printed down in the left-hand corner, 'Clyde W. Henry,' and I ask you to look at the reverse side. There appears on the reverse side, 'Sacramento, Calif. To Watchman at Ice Palace. Please allow bearer Mr. Tony Sanchez to enter with his two men to remove pipe and equipment. Clyde Henry.' Is that the card which was presented to you?

A. Yes.

Mr. Miller. I ask that that be admitted in evidence.

Mr. Wallace [for Lawrence] Is there any testimony as to when this card was presented to him?

Mr. Miller. I will ask him.

The Court. It may be admitted and marked.

(The card was marked Plaintiff's Exhibit No. 8 in evidence.)

By Mr. Miller:

Q. I will ask you, Mr. Kenyon, do you recall when that card was presented to you?

A. I think in my deposition it was a Monday prior to the fire, prior to the date the fire happened.

Q. What day of the week was the fire?

A. I don't recall.

Mr. Getz. Let us be clear on that. I have a newspaper clipping of Saturday, April 10, giving the story of the fire, so April 9 must have been Friday.

The Court. Q. It was the Monday before Friday, April 9?

A. Yes.

By Mr. Miller:

Q. To the best of your recollection, it was Monday before that Friday that you either called or notified the watchman to let these people in pursuant to this card that you received from Mr. Henry, is that correct?

A. That is right.

Q. After you had made arrangements with the guard to let these men go on the premises, did you attempt to find out or did you go out there to see what they were doing?

A. No.

Q. So that as far as you know, do you know they went out and got into the premises?

A. Just by hearsay.

Q. When you say 'by hearsay,' what do you mean?

A. By a report from my foreman.

Q. Did your foreman report to you that they went in?

A. The foreman told me that they went in and tried to get through to the engine room, so-called, and they were unable to, and they went out of the building.

Q. What day was that, do you recall?

A. I don't recall.

Q. That was after you had given them authority to go out there?

A. Yes.

Q. At any later time did your foreman report as to any work they were doing?

A. I don't know.

Q. When did you first learn that these men had gone out and started to remove a brine tank from the engine room?

Mr. Wallace. I do not want to object——

Mr. Miller. The card is there. Refer to it. It says 'pipe and equipment.'

Mr. Wallace. There is not any evidence, as I understand it, yet that the men referred to on this card are the men even that went into the engine room, and if I understood Mr. Henry's testimony, it was

that they were not the same men. I don't know whether there were two sets of men or not, but apparently the evidence today would indicate there were.

The Court. Is there an objection?

Mr. Miller. I will withdraw that question and restate it, and maybe we can get the facts."

and again (R. 194-196 in 11418):

"Q. [by Mr. Getz for Capitol] At the time that card was handed to you, was anything whatsoever said to you about any brine tank?

A. No.

Q. Did you know anything about any brine tank?

A. No.

Q. Did you ever know anything about a brine tank until after this fire?

A. I did not.

Q. Did you ever know or have any reason to believe that they would enter the engine room for the purpose of using an acetylene torch or any kind of a torch in there?

A. The card read 'pipe and equipment,' and the pipe was in the main building, and there was also equipment such as barrels—small equipment.

Q. Did that require any torch or any use of an acetylene torch for the purpose of removing it?

A. There was no torch or anything mentioned about a torch to me in any way.

Q. Did you ever hear of Mr. McGrew prior to the time of the fire?

A. I did not.

Q. Had you had any dealings with him?

A. No.

Q. Or authorized Mr. McGrew to enter into the building?

A. I did not.

Q. You said that the foreman informed you that they could not get into the engine room. Wasn't that because the tires were stacked against that door between the main building and the engine room?

A. That is correct.

Q. Were there any tires stored in the engine room?

A. No.

Q. There was never any intention of storing any tires in the engine room?

A. No.

Mr. Getz. That is all.

The Court. Is there anything else?

By Mr. Glicksberg [for Henry and Elmore]:

Q. With respect to that card which was introduced in evidence here as Plaintiff's Exhibit 8, I think on direct examination you testified that it was given to you Monday prior to the day of the fire. How do you recall that date?

A. I really cannot recall, but I think there was some reason for my remembering it was on a Monday.

Q. Do you know Mr. Sanchez?

A. No.

Q. Would you be able to recognize him if you saw him?

A. Somebody told me he was in court here.

Mr. Glicksberg. Mr. Sanchez, will you stand up?

Q. Do you recognize him now?

A. No, I can't say that I do.

Q. You don't know of your own knowledge whether that card was given to you the week of the fire or the Monday prior to the fire?

A. It was given to me on a Monday before the Friday of the fire—there was about four days elapsed.

Q. I am asking you, how do you know it was four days or ten days?

A. I could not tell you right now, but there was a reason for it someplace.

Q. What is the reason?

A. I don't know.

Q. Then it might as well be ten days before the fire?

A. No, it could not have been. I don't recall the day.

Q. You don't know?

A. No."

From the foregoing it is apparent that while Gordon Kenyon thought he had authorized McGrew's entry he was in error because he did not know, and could not have known, that Henry had authorized two entries, one of the Ice Palace and one of the connecting engine room. This explains Gordon Kenyon's confusion as to dates. The card presented to Gordon Kenyon did not mention McGrew.

From an evidentiary standpoint the evidence which makes the court's interpretation clearly erroneous is the testimony of V. J. McGrew. McGrew testified (R. 209-211 in 11418):

"Mr. Lombardi [for Defense Supplies Corporation]. Q. Now, at the time you first started work at the Ice Palace on this particular job, who did you have with you to assist you in the work?

A. I had Mr. Elmore.

Q. Did anybody else come with you at the time you went to the Ice Palace?

A. I either went to the Ice Palace with Mr. Sanchez or I followed him over. It might have been that he might have driven over in his own car and I drove over myself.

Q. Did anyone give you permission to go on the premises for the purpose of doing this work?

A. Mr. Sanchez did, yes.

Q. Mr. Sanchez?

A. Yes.

Q. Do you know who Mr. Sanchez is?

A. He is manager or superintendent of the West Sacramento Water Company.

Q. When you first went to the Ice Palace to do this work, did you see any of the guards there?

A. I seen them, but I didn't talk to them.

Q. Did the guards permit you to go on the premises?

A. They did not stop me.

Q. Had you gone to the Ice Palace for the purpose of starting this work prior to April 8, 1943?

A. I believe we were over there twice, yes.

Q. You were there?

A. I was there, yes.

Q. What did you do at that time?

A. I did not do anything at that time. I believe Mr. Sanchez talked to the guard, and the guard required additional information or additional authority.

Q. When was that?

A. That was, I think, the day before; that would be the 7th.

Q. Then you went to the Ice Palace, but you did not start any work at that time?

A. I did not start any work, and I do not believe I even went into the building or even close to the building."

and (R. 253-255 in 11418):

"Q. [by Mr. Getz for Capitol]. When was the first time that you went to the Ice Palace in connection with the removal of any equipment or steel pipe?

A. The first time I went there, I believe, was either the 6th or 7th.

Q. Either the 6th or the 7th?

A. Yes.

Q. You went with Mr. Sanchez. You said Mr. Sanchez was there, didn't you?

A. Yes.

Q. Now, then, on that day did you go into the main building?

A. No.

Q. Did you ask permission to go in the main building?

A. I at no time asked permission personally to go into that building.

Q. Did you at any time get permission from anybody to go into that building, or the engine room?

A. You mean personally?

Q. Yes.

A. No.

Q. You do know that when you went down the 7th the guard told you you could not go in without further authority?

A. I believe he told Mr. Sanchez; he did not tell me. Mr. Sanchez told me.

Q. You understood that Mr. Sanchez had permission, but you don't know that of your own knowledge, do you?

A. I did not personally go with him, no.

Q. You don't know from whom, if at all, he obtained any such permission, do you?

A. That is right.

Q. Do you know whether or not Mr. Sanchez had been there at the building and removed some pipe a short time before that?

A. No, I don't know that, either.

Q. When you entered the engine room you entered it from the outside of the main building, didn't you?

A. Yes.

Q. And you did not at any time contact or have anything to do with anyone there employed by the Capitol Chevrolet Company?

A. No, I didn't have anything to do with them.

Q. At no time in all of your dealings at the Ice Palace did you have any contact of any kind with anyone from the Capitol Chevrolet Company: Is that right?

A. No, I didn't personally know any of them.

Q. And this enterprise that you were engaged in had no connection whatever with the Capitol Chevrolet Company, did it?

A. Not to my knowledge.

Q. You were never employed or retained or contacted with by the Capitol Chevrolet Company?

A. No.

Q. You were not engaged in anything for their benefit?

A. Not to my knowledge."

From a legal standpoint the conclusion which makes the court's findings "clearly erroneous" is the conclusion absolving Henry from liability to Defense Supplies Corporation (R. 82 in 11418). If the fire was caused by the only entry of which Gordon Kenyon had knowledge, that of Sanchez on Henry's business to remove pipe, then Henry would have been liable to Defense Supplies Corporation. Judgment on the complaint of Defense Supplies Corporation was rendered in favor of Henry (R. 84 in 11418). Gordon Kenyon's authorization of Sanchez's entry could impose no liability on Capitol because such

did not cause the fire and he could not have ascertained from him that at a later time Lawrence's watchman would permit McGrew to enter the engine room with acetylene equipment. Furthermore, there is absolutely no evidence that prior to the fire Gordon Kenyon or anyone connected with Capitol had any knowledge that an acetylene torch was being used or would be used in the Ice Palace; the only one who had this knowledge was Kissell, who was employed by Lawrence.

The foregoing analysis shows that the only failure of Capitol to safeguard the storage of the tires occurred in storing the tires and tubes in the Ice Palace; this act was not only acquiesced in but directed by Lawrence. In so far as Defense Supplies Corporation is concerned, Capitol failed in its nondelegable duty as a custodian of the tires to safeguard the tires by failing to keep McGrew from using his acetylene torch in the adjacent premises. The following discussion will show that as between Lawrence and Capitol, this duty was undertaken by Lawrence several months after the agency agreement was executed and before Capitol agreed to remove the tires and tubes from its own premises.

C. THE INDEPENDENT ACTIVE NEGLIGENCE OF LAWRENCE CAUSED THE DAMAGE TO DEFENSE SUPPLIES CORPORATION.

It has previously been stated that Lawrence undertook to provide and did provide watchmen for the Ice Palace. The evidence on this is the following. Gordon Kenyon testified (R. 193 in 11418):

> "Q. [by Mr. Getz for Capitol]. Did the Defense Supplies Corporation also place guards in that palace?

A. There were guards placed there by the Lawrence Warehouse Company.

Q. Were they allowed to enter the Ice Palace?

A. The guards were allowed to, yes."

The guard, Kissell, testified and counsel stated as follows (R. 284-286 in 11418):

"Cross-Examination.

Mr. Getz. Q. Mr. Kissell, do you know who engaged the Burns Detective Agency to guard this Ice Palace?

A. I don't know positively, no.

The Court: Is there any dispute about that, who employed the Burns Detective Agency?

Mr. Miller [for Defense Supplies Corporation]. I understand there may be, but I didn't think there was.

Mr. Getz. Perhaps counsel will stipulate. Is it stipulated that the Burns Detective Agency was hired at the instance and request of the Defense Supplies Corporation through the Lawrence Warehouse Company, that is, the Lawrence Warehouse Company actually made the arrangements and the Defense Supplies Corporation paid the cost of that guarding?

Mr. Miller. No, that is not true. The Defense Supplies Corporation did not pay the Burns Detective Agency for guarding.

Mr. Getz. They reimbursed the Lawrence Warehouse Company for the cost of the guarding.

Mr. Miller. We will stipulate that the guards were employees of the Burns Detective Agency; that arrangements were made with the Burns Detective Agency by the Lawrence Warehouse Company at the request of the Defense Supplies Corporation; that the Burns

Detective Agency was paid by Lawrence Warehouse Company, and that Defense Supplies Corporation reimbursed the Lawrence Warehouse Company for the cost of the guard service. Is that correct?

Mr. Getz. Is it further stipulated that the duties of the guards were prescribed by the Defense Supplies Corporation and transmitted through the Lawrence Warehouse Company?

Mr. Miller. No, it is not so stipulated. I do not understand that to be the fact.

Mr. Getz. Is it stipulated that the number of guards and the number of hours of work were prescribed by the Defense Supplies Corporation?

Mr. Miller. No, that is not our understanding.

Mr. Wallace [for Lawrence]. Let me see if I can clarify the situation. The Defense Supplies Corporation requested a 24-hour guard established. They did not prescribe the hours of any particular guard; they just wanted 24-hour guard service. The Lawrence Warehouse Company employed the Burns Detective Agency and paid them, and the Defense Supplies Corporation reimbursed Lawrence Warehouse Company.

The Court. Does that clear that up?

Mr. Getz. Yes. Will you stipulate that the Capitol Chevrolet Company had nothing to do with the hiring of the guards or the prescribing of their duties?

Mr. Miller. I don't know.

Mr. Wallace. There is one further thing. I think the Burns Detective Agency as a guard was approved by the RFC.

Mr. Miller. We will stipulate the RFC approved the Burns Detective Agency as an agency.

Mr. Getz. Q. Now, Mr. Kissell, you were not in any way employed by the Capitol Chevrolet Company, were you?

A. No.
Q. They had no authority over you whatsoever?
A. No."

More conclusive is an extract from the answer of Lawrence to the complaint; this portion of the answer was read into the record on the consolidated trial of the cross-claims of Lawrence on March 5, 1952 (R. 351-352 of 13840); also the answer is verified under oath by the secretary of Lawrence. It reads as follows:

> "Incident to said storage and the rental of said premises, plaintiff directed that this defendant employ watchmen for the said premises and for the tires and tubes therein stored, and accordingly, this defendant employed and regularly maintained on said premises day and night watchmen of the agency selected and paid for by the said plaintiff."

Thus Lawrence cannot deny and has judicially admitted that after the execution of the agency agreement by Lawrence and Capitol on October 1, 1942, the duties of the parties were modified. Capitol provided the place of storage and Lawrence undertook to provide watchmen to safeguard the storage.

The evidence is clear that Lawrence, not Capitol, was reimbursed by Defense Supplies Corporation for employing the watchmen (R. 286 in 11418). At the trial of the complaint of Defense Supplies Corporation, Lawrence contended that this reimbursement had the effect of making Lawrence's watchmen the watchmen of Defense Supplies Corporation (Opinion, R. 72 in 11418). In its opinion the court avoided this question by stating in a footnote (R. 72 in 11418) (67 F.Supp. p. 21, n. 3):

> "The evidence indicates that the armed guard service was purely an additional and independent protective activity to prevent pilferage of the tires."

This footnote is not only entirely without evidentiary support but is contrary to human experience.

The Findings of Fact and Conclusions of Law and the Judgment rendered on the complaint of Defense Supplies Corporation, it will subsequently be shown, are consistent only with the court's holding that these employees of Lawrence were actively negligent.* This question is, however, conclusively answered on the evidence by a portion of the verified answer of Lawrence read into evidence at the trial of the cross-claims on March 5, 1952 (R. 352 in 13840); the answer states:

> "* * * that said watchman was under the direction and control of plaintiff and was so maintained to protect plaintiff's tires and tubes from loss or damage by fire and from theft, or other loss; * * *."

The testimony of the watchman, W. R. Kissell, is also conclusive on this question; he testified (R. 280-282 in 11418):

> "Q. [by Mr. Miller for Defense Supplies Corporation]. Do you recall on April 9, 1943, seeing some workmen working in the engine room at the Ice Palace?
>
> A. Yes.
>
> Q. Did you permit them to go in there?
>
> A. They had a permit, I did not do the permitting; that is, there was an order left there for them

*See pages 50-54 of this Brief.

to go to work. I did not stop them. I allowed them to go to work that morning.

Q. What time did you go on duty?

A. At eight o'clock.

Q. Were they working when you came on duty?

A. Yes, they were.

Q. You say there was an order. What do you mean by that?

A. There was an order came from the Capitol Chevrolet Company permitting Mr. Henry to remove this stuff from the engine room.

Q. Did that appear in your book of instructions, or whatever you kept there?

A. That was our orders, not to let anything be moved from the premises unless there was an order from the Capitol Chevrolet Company.

Q. While you were on duty that day and before 12:30 did you have occasion to go back to the engine room and observe this work?

A. I went back, around 11:30, I would say.

Q. What was happening when you went in there at 11:30?

A. Well, one man was just standing there, and another man was using an acetylene torch.

Q. What was he doing with the acetylene torch?

A. He was cutting a piece of steel or sheet metal.

Q. Did you have occasion to look around the engine room at that time and observe the condition of the floor and the rest of the room?

A. I was not inside of the building, I was just to the door.

Q. Did you look in the door?

A. Just in the door, yes.

Q. What did you see on the floor?

A. Well, I did not see much of anything on the floor, with the exception of one thing, on the northeast corner of this tank he was cutting on.

Q. What did you see there?

A. It looked to me just like, well, there was some dark material just under the edge of the tank.

Q. Did you say anything to the man at that time?

A. Well, I said something to the man who was standing there, I asked him to be sure and be cautious about fire, watch for fire, and he said they were.

Q. This, you say, was about 11:30?

A. Somewhere around there.

Q. What did you do then?

A. I went back. I went back into the front part of the building.

Q. When did you first learn that a fire had started?

A. Well, approximately, I would say, just about 12:30."

The watchman obviously considered it within his duties to watch for fire. The foregoing is all the evidence on the question of the duties of the watchmen; it shows beyond question that their duties included protecting the premises from fire. The quoted testimony also shows that Lawrence's watchman disobeyed his instruction, for it was not Henry or Sanchez but McGrew, an independent contractor, who was in the engine room.

Thus, as between Lawrence and Capitol, the only one who had knowledge of McGrew's entry and use of an acetylene torch was Lawrence's agent. There is no finding of the court below expressly to the contrary, although the court did find generally against the defenses of con-

tributory negligence (R. 125 in 13840). The specific finding of negligence on the part of Capitol is as follows (R. 119-120 in 13840):

> "That on or about April 9, 1943, while tires and tubes belonging to plaintiff, Defense Supplies Corporation, were so stored in said Ice Palace, Capitol Chevrolet Company negligently consented to and approved the entry of one V. J. McGrew into said 'Ice Palace' and its attached engine and boiler room without ascertaining his intentions. That at said time and place said cross-defendant Capitol Chevrolet Company negligently failed to maintain adequate safeguards against fire."

Accepting this finding it would nevertheless appear that McGrew was an efficient intervening cause in so far as Capitol is concerned for Gordon Kenyon had no reason to believe that McGrew would enter the Ice Palace, much less that he would use an acetylene torch or create a fire hazard. Also he could rely on Lawrence performing its duty to safeguard the Ice Palace. At most Capitol's negligence could be "passive." Lawrence's negligence was on the contrary obviously "active," for the above-quoted testimony shows a direct and conscious breach of its duty to Capitol which it undertook after the agency agreement was executed.

The foregoing evidence is unequivocal; it is not directly contradicted by the findings; it shows conclusively that only Lawrence knew of McGrew's entry with an acetylene torch. Inasmuch as the wrongful acts of Lawrence were not covered by Capitol's indemnity agreement, Lawrence is clearly not entitled to indemnification under the law

previously set forth. This is true even if, as found by the District Court, Capitol was negligent and failed to perform its duty of providing a safe place of storage for the tires and tubes.

III. THE JUDGMENT AND THE FINDINGS OF FACT AND CONCLUSIONS OF LAW RENDERED ON THE COMPLAINT OF DEFENSE SUPPLIES CORPORATION ARE BINDING ON LAWRENCE WAREHOUSE COMPANY AND DEMONSTRATE THAT LAWRENCE WAREHOUSE COMPANY WAS ACTIVELY NEGLIGENT.

The Judgment and the Findings of Fact and Conclusions of Law rendered on the complaint of Defense Supplies Corporation were introduced in evidence at the trial of Lawrence's cross-claims on March 5, 1952 (Exs. A, B; R. 347-348 in 13840).

A. IN SO FAR AS LAWRENCE WAS CONCERNED, THE GROUND OF ITS LIABILITY (UPON WHICH DEPENDED ITS RIGHT TO INDEMNITY) WAS PLACED IN ISSUE, AS A MATTER OF LAW AND AS A MATTER OF PLEADING, BETWEEN LAWRENCE AND DEFENSE SUPPLIES CORPORATION AT THE TRIAL OF THE COMPLAINT IN ACTION NO. 23171.

From the standpoint of the pleadings it is clear that Lawrence intentionally placed in issue the ground of its liability upon which depended its right to indemnity. The complaint of Defense Supplies Corporation contains no averment of a principal-agent relationship between Lawrence and Capitol. On the contrary it avers the joint and concurrent negligence of Lawrence in substantially the same wording as is found in the Findings of Fact and Conclusions of Law rendered on the complaint of

Defense Supplies Corporation (R. 348-349 in 13840). The answer of Lawrence to the complaint of Defense Supplies Corporation, however, expressly tendered the issue of whether Lawrence was primarily or secondarily liable; in fact the cross-claim asserted against Capitol, averring that Capitol was the sole custodian of the tires and tubes, was expressly pleaded by way of answer to the complaint of Defense Supplies Corporation (Ex. D; R. 350-351 in 13840).

Furthermore, the judicial record of the trial of the complaint of Defense Supplies Corporation shows that Lawrence was actively negligent and primarily liable to Defense Supplies Corporation so as to preclude any right to indemnity. That record is inconsistent with the contention that Lawrence was only secondarily liable. The judgment in favor of Defense Supplies Corporation plainly states that Lawrence and Capitol are jointly and severally liable to Defense Supplies Corporation (R. 83-84 in 11418). Under California law a principal is only secondarily liable for the undirected torts of his agent and is not a joint tort-feasor if his liability is predicated solely upon *respondeat superior.*

Benson v. Southern Pacific Co., 177 Cal. 777, 171 Pac. 948 (1918);

Bradley v. Rosenthal, 154 Cal. 420 at 423, 97 Pac. 875 (1908);

Fimple v. Southern Pacific Co., 38 C.A. 727, 177 Pac. 871 (1918).

In California a joint judgment against tort-feasors precludes contribution or indemnity.

Adams v. White Bus Line, 184 Cal. 710 at 713-714, 195 Pac. 389 (1921).

In jurisdictions which recognize a right to indemnity by one passively negligent from one actively negligent, such right does not exist where the wrongdoers are *jointly* liable and where their acts *join* and concur to cause damage. In *Maryland Casualty Co. v. Frederick Co.,* 142 Ohio St. 605, 53 N.E. 2d 795 (1944), the Supreme Court of Ohio held that one passively negligent was entitled to indemnity from one actively negligent but expressly pointed out that they were not joint tort-feasors.

The Findings of Fact and Conclusions of Law by the court, rendered on the complaint of Defense Supplies Corporation, unequivocally state that the negligent *acts* of Lawrence contributed to the damage of Defense Supplies Corporation and that the *acts* of Lawrence and Capitol concurred and joined together to cause the damage (R. 80-81 in 11418). Finding, No. VI states (R. 81 in 11418):

> "VI.
>
> The negligence of defendants V. J. McGrew, Lawrence Warehouse Company, and Capitol Chevrolet Company concurred and joined together to destroy plaintiff's goods, as aforesaid."

Finding, No. VII states (R. 81 in 11418):

> "By reason of said negligent acts of Defendants V. J. McGrew, Lawrence Warehouse Company and Capitol Chevrolet Company, plaintiff has been damaged in the sum of $41,975.15."

Under California law the artfully precise language of these findings bars Lawrence from asserting that its lia-

bility was founded solely on the doctrine of *respondeat superior.*

Salter v. Lombardi, 116 C.A. 602, 3 P.2d 38 (1931), hearing in Supreme Court denied;

Bradley v. Rosenthal, 154 Cal. 420 at 423, 97 Pac. 875 (1908).

Benson v. Southern Pacific Co., 177 Cal. 777, 171 Pac. 948 (1918), involved a personal injury action against the Southern Pacific Company and its "motorneer." A verdict was returned against the company, no mention being made of the motorneer; and for this reason the company appealed from the judgment entered on the verdict. The court affirmed the judgment on the ground that the verdict was based upon joint liability and concurrent negligence as distinguished from a *respondeat superior* theory of liability (177 Cal. 779-780).

The federal courts in California have held that under California law a principal is not jointly liable with an agent if the principal's liability is based solely on *respondeat superior* although they may be joined in the same action.

Stephens v. Southern Pac. Co., 16 F.2d 288 (N.D. Cal. 1926);

La Flower v. Merrill, 28 F.2d 784 (N.D. Cal. 1928).

As a matter of law, the ground of Lawrence's liability, upon which its right to indemnity depended, was placed in issue at the trial of the complaint of Defense Supplies Corporation. The possibility of exoneration of Lawrence if Capitol were found not to be negligent, placed in issue

the question of whether Lawrence was primarily liable on a theory other than *respondeat superior.*

Bradley v. Rosenthal, 154 Cal. 420 at 426, 97 Pac. 875 (1908);

Fimple v. Southern Pacific Co., 38 C.A. 727 at 729-730, 177 Pac. 871 (1918).

It follows, therefore, that the record of the action which Lawrence relies on to prove Capitol's liability, establishes that Lawrence's independent negligence contributed to the loss for which recovery was awarded to Lawrence.

B. THE JUDICIAL RECORD OF THE TRIAL OF COMPLAINT IN ACTION NO. 23171 IS CONCLUSIVE ON LAWRENCE.

As a matter of evidence, the plain and unambiguous judicial record can neither be contradicted nor explained by extrinsic evidence or a court's opinion.* A judicial record is defined as follows (C.C.P., sec. 1904):

> "A judicial record is the record or official entry of the proceedings in a court of justice, or of the official act of a judicial officer, in an action or special proceeding."

As a matter of law, the determination of the primary and active negligence of Lawrence in the judicial record of the trial of the complaint estops Lawrence from showing otherwise. Recently this court held that under Oregon law one could not urge a judgment as an estoppel unless it was a party to the prior proceeding.

Booth-Kelly Lumber Co. v. Southern Pacific Co., 183 F. 2d 902 (9th Cir. 1950).

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*This point is further discussed under Point IV (Brief, pp. 57-66).

Of course, Capitol in the instant case was a party to the prior proceeding, but under the law of California it is only necessary that the one *against* whom the estoppel is asserted must have been a party to the prior action.

Bernhard v. Bank of America, 19 Cal. 2d 807 at 811-813, 122 P. 2d 892 (1942).

Also the California cases which permit actions over by a principal against an agent in the same action in which they are sued by third persons, hold the parties to be estopped by the record in that action.

Salter v. Lombardi, 116 C.A. 602, 3 P. 2d 38 (1931), hearing in Supreme Court denied;

Bradley v. Rosenthal, 154 Cal. 420 at 423, 97 Pac. 875 (1908).

See,

Adams v. White Bus Line, 184 Cal. 710 at 713-714, 195 Pac. 389 (1921).

Salter v. Lombardi, 116 C.A. 602, 3 P. 2d 38 (1931), hearing in Supreme Court denied, was an action in tort against several persons. The plaintiff recovered judgment against all defendants. One defendant paid one-half the judgment and his attorney, for reasons not here relevant, paid the other half, an assignment of the judgment being taken. Lewis, one of the defendants, sought to have full satisfaction of the judgment entered, but the court entered only a partial satisfaction. Lewis appealed and the appellate court affirmed on the ground that to the extent of the amount contributed by the attorney there was a valid assignment of the judgment. It was contended by the respondent on appeal that because

Lewis' liability was primary and that of the codefendants was based solely on *respondeat superior,* Lewis was not entitled to have satisfaction in any amount entered. In denying this argument the court stated (p. 604):

> "With appellant's basic premise we are agreed, that the judgment is one against joint tort-feasors. His motion for full satisfaction was made in part upon the record and files of the action. This lays before us the findings of fact upon which the judgment was founded, where it is finally adjudicated, so far as this case is concerned, that 'defendants *by themselves,* their agents, employees and servants' acted so negligently that plaintiff had judgment. In the face of this finding, plaintiff's successor in interest may not be heard to say that the tort was solely that of defendant Lewis, and that Lewis' co-defendants were liable only on the theory of *respondeat superior.* We must consider the judgment as one against tort-feasors."

Referring again to this court's decision in *Booth-Kelly Lumber Co. v. Southern Pacific Co.,* 183 F. 2d 902 (9th Cir. 1950), there is no conflict in the decisions generally as to the effect of a prior adjudication of negligence against a party seeking indemnity. In the *Booth-Kelly Lumber Co.* case the party *against* whom indemnity was sought relied on the former proceedings, and this court held those proceedings not to be determinative. A contrary result is reached where, as in the instant case, the party seeking indemnity relies on the former proceedings.

> *Builders Supply Co. v. McCabe,* 336 Pa. 322, 77 A. 2d 368 (1951), containing an analysis of the leading cases.

The only possible way that Lawrence can avoid the effect of the prior adjudication of its active negligence is to show that its primary or secondary negligence was not an issue at the trial of the complaint of Defense Supplies Corporation. As shown above, Lawrence expressly pleaded this issue in its answer to Defense Supplies Corporation (R. 45-48 in 11418). If, however, liability as between Lawrence and Capitol was not in issue at the first trial, then the court was in error in considering at the trial of the cross-claims the evidence adduced at the first trial on that issue.

IV. IT WAS ERROR TO ADMIT OR TO CONSIDER AS EVIDENCE AT THE TRIAL OF THE CROSS-CLAIM OF LAWRENCE WAREHOUSE COMPANY THE TRANSCRIPT OF EVIDENCE ADDUCED AT THE TRIAL OF THE COMPLAINT OF DEFENSE SUPPLIES CORPORATION.

The only evidence adduced at the trial of the cross-claim of Lawrence against Capitol to show that Capitol breached some duty to Lawrence was the evidence previously adduced at the trial of the complaint. There is some question as to whether the court considered the evidence as being reintroduced at the trial of the cross-claim (R. 317 in 13840), or whether it considered that evidence adduced at the trial of the complaint was somehow in the action on all issues (R. 29, 117 in 13840). Clearly the transcript of testimony (and the Exhibits authenticated thereby) could not have been reintroduced because Lawrence made no attempt to show the unavail-

ability of the persons whose testimony was offered. This is indisputably the law in California.

California Code of Civil Procedure, Sec. 1870 (8);

Gordon v. Nichols, 86 C.A.2d 571 at 576, et seq., 195 P.2d 444 (1948), petition for hearing by Supreme Court denied;

and in the Federal Courts:

Federal Rules of Civil Procedure, Rule 43(a);

Great Northern Ry. Co. v. Ennis, 236 Fed. 17 at 25, et seq. (9th Cir. 1915);

United States v. Aluminum Co. of America, 1 F.R.D. 48 at 50 (S.D.N.Y. 1938).

A. THE EVIDENCE WAS NOT ADMISSIBLE AND COULD NOT BE CONSIDERED TO SHOW THAT CAPITOL BREACHED SOME DUTY TO LAWRENCE.

It is equally clear that the court was erroneous in declaring that the evidence adduced at the trial of the complaint was "already" in evidence upon the issues raised by the cross-claims. It is fundamental in an adversary proceeding that evidence can be considered against a party only as to issues on which the party has a right to cross-examine.

Industrial Products Mfg. Co. v. Jewett, 15 Fed. Rules Serv. 43a.3,Case 1, (S.D. Iowa 1951);

California Code of Civil Procedure, Sec. 1870 (8);

Werner v. State Bar, 24 C.2d 611 at 616, 150 P.2d 892 (1944).

In so far as Capitol was concerned the only issues on the trial of the complaint were whether it breached some duty to Defense Supplies Corporation and the amount of

damage caused thereby. The issue on the trial of the cross-claims was whether Capitol had breached some duty to Lawrence, which thereby caused it to incur liability to Defense Supplies Corporation. Thus, in order to consider as evidence on the cross-claims the evidence adduced at the trial of the complaint (seven years before), this court must hold that the issues raised in the cross-claims were then in issue. This is patently not the case.

When Defense Supplies Corporation presented its case, it would not have been permissible for Capitol to object, cross-examine and present additional evidence on the issue of whether Capitol was directed by Lawrence to do the acts in question, on the issue of whether Lawrence had assumed nondelegable duties of Capitol and on other issues arising between Lawrence and Capitol. These matters would have been irrelevant, confusing and embarrassing to Defense Supplies Corporation's case because they would not have constituted a defense to Defense Supplies Corporation's claim.

Bradley v. Rosenthal, 154 Cal. 520, 97 Pac. 875 (1908).

Undoubtedly the issues between Capitol and Lawrence were beyond the scope of cross-examination of witnesses called by Defense Supplies Corporation (Rule 43, F.R. C.P.). Conclusive on this question are the facts that Defense Supplies Corporation was the only party to put on its case in the first trial and that the action was submitted on motions to dismiss its complaint (R. 308-309 in 11418). The cases clearly establish that evidence adduced on the plaintiff's case against codefendants or against

an indemnitee in an action in which the indemnitor is held to be bound is limited to the issues between the plaintiff and the defendant or defendants.

The leading case on this question is *Washington Gas Co. v. Dist. of Columbia,* 161 U.S. 316 (1895). This was an action in which the District of Columbia sought recovery over against the Gas Company as a result of personal injury caused by an open gas box placed and maintained in the sidewalk by the Gas Company. Judgment in favor of the person injured had been recovered against the District and the Gas Company had been notified and given an opportunity to defend the action, as a result of which the judgment in that action was held to be binding upon the Gas Company. At the trial of the District's action against the Gas Company the District introduced independent evidence of the Gas Company's duty to maintain the gas box and of its failure in that duty. One of the questions raised on appeal was whether it was proper for the trial court to admit testimony of one Smith which had been adduced in the personal injury action. On this question Justice White stated for the court (p. 331):

> "As to the first of these two contentions, the trial court instructed the jury that, although the judgment in the first action was binding on the Gas Company, it was not conclusive as to the negligence of that company, but that such negligence could be inferred by the jury from the testimony of Smith, thus treating that testimony as possessing intrinsic proving power. Both these rulings were erroneous. The testimony of Smith taken in the first suit was *res inter alios,* and therefore incompetent against the Gas

> Company as independent testimony. The fact that it was admissible for the purpose of determining the scope of the thing adjudged in the suit in which it was given, did not justify its being used for a distinct and illegal purpose. Error, however, in this particular was in no sense prejudicial if the judgment in the first action conclusively established the negligence of the Gas Company."

In the case at bar, appellants do not deny that the judgment in favor of Defense Supplies Corporation establishes Capitol's negligence to Defense Supplies Corporation; they do deny that the judgment and the evidence in that case could establish that Capitol breached any duty to Lawrence.

In seeking recovery over against an alleged indemnitor, an indemnitee must introduce additional evidence on the issue of the indemnitor's breach of duty to the indemnitee.

City of Seattle v. Shorrock, 100 Wash. 234, 170 Pac. 590, 593 (1918);

Boston & M. R. R. v. Sargent, 72 N.H. 455, 57 Atl. 688 (1904).

An analogous case is *Wolf v. United Air Lines,* 12 F.R.D. 1 (M.D. Pa. 1951). That was an action under the Pennsylvania Survival Statute against United Air Lines for the death of plaintiff's decedent while a passenger in an airplane owned and operated by the defendant. Prior to the trial, the plaintiff moved to permit the use of depositions of certain witnesses in actions by other persons against the same defendant which arose out of the same airplane crash in which plaintiff's decedent

was killed. In the other actions the Douglas Aircraft Co. was also joined as a defendant and United Air Lines had filed cross-claims against Douglas. The district court denied the motion on the grounds that the issues and parties in the action in which the depositions were taken were not identical with those in the instant action. In pointing out the differences in issues, Chief Judge Watson emphasized that the issues raised by the cross-claims had so "overshadowed" the plaintiff's claim that it would be improper to permit the use of the depositions. That this difference in issues was clearly recognized by counsel in the instant case is disclosed in the following statements by counsel for Lawrence at the trial of the cross-claims (R. 314-315 in 13840):

> "Mr. Garrison. We are in this position: We have a case, 23171, that case right there, which had a complaint filed, an answer filed, and cross-claims filed. Your Honor passed and decided on the principal complaint, and the cross-claims have never been decided, and they were specifically reserved, as I understood it, for trial at a later date. So we have a cross-claim in that case which has never been decided and the issues have never been litigated. What we are doing now is proceeding to complete that trial and try the cross-complaint."

At this point it should be emphasized that statements in the opinions of the trial court and the Court of Appeals rendered on the trial and the appeal of the complaint of Defense Supplies Corporation which may have indicated that Lawrence was liable to Defense Supplies Corporation solely on a theory of *respondeat superior,* furnished no basis for an appeal by Capitol. The basis of

Lawrence's liability was certainly not in issue as to Capitol, just as Capitol could not have defended by showing that Lawrence had undertaken some of the nondelegable duties which Capitol, as custodian of the tires, had assumed to Defense Supplies Corporation.

Nothing is established by simply stating that the claim of Defense Supplies Corporation and the various cross-claims were consolidated or tried together because in that situation evidence in one action is evidence in the other only if the parties so agree or the court so orders before the trial.

> *National Nut Co. v. SuSu Nut Co.*, 61 F. Supp. 86 (N.D. Ill. 1945).

The only order in the instant action with reference to the cross-claims was entered *after* the trial on February 20, 1946; it states substantially as follows (R. 4 in 13840):

> "Feb. 20, 1946.
>
> Goodman, J. ordered findings prepared in main case; further ordered hearing on cross-complaints dropped from calendar to be restored on motion of interested parties."

Neither the foregoing order nor the statement in the court's opinion retaining jurisdiction of the cross-claims (R. 75 in 11418) could be, or was intended to be, a statement that the evidence offered in the trial of the complaint would be evidence on the issue of the liability between Lawrence and Capitol. Had the parties considered the trial in 1946 to be a trial of the cross-claims, it is inconceivable that Lawrence would have delayed seven years in having a judgment entered.

Actually, however, cross-defendants must be ultimately successful in obtaining judgment in this action whichever way the court rules on this question. To permit the introduction or use at the second trial of the evidence adduced at the trial of Defense Supplies Corporation's complaint on the issue of Capitol's liability to Lawrence, the court must hold that in the first trial the question of liability between Lawrence and Capitol was in issue as to Capitol. If it is true that this question was in issue as to Capitol, then this is an additional reason why the court must hold that this question was in issue as to Lawrence. As previously pointed out, if this question was in issue as to Lawrence, Lawrence is estopped by the adverse judicial record on that evidence. To hold Lawrence estopped on questions which it expressly placed in issue on the first trial is only to follow the course which Lawrence voluntarily adopted in its pleadings. To hold Capitol estopped on questions which it did not, and could not, place in issue is to deprive Capitol of its day in court.

B. THE EVIDENCE WAS NOT ADMISSIBLE TO SHOW AN ALLEGED "TRUE MEANING" OF THE JUDGMENT AND FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The Judgment, Findings of Fact and Conclusions of Law rendered on the complaint of Defense Supplies Corporation were admittedly admissible and could be considered to show that Lawrence was liable to Defense Supplies Corporation and the amount of that liability. They could also be used to show that the dangerous condition of the Ice Palace and McGrew's use of an acetylene torch in the Ice Palace caused the loss. The transcript of evidence, however, could not be introduced or considered

to establish these same elements, much less other elements, of Lawrence's claim because of familiar rules of evidence.

The documents themselves are the "best evidence" of the judicial determination.

Sills v. Forbes, 33 C.A.2d 219 at 229, 91 P.2d 246 (1939), hearing in Supreme Court denied.

The evidence adduced at the trial of the complaint became "integrated" into the documents, the judicial record.

In re Crosby Stores, 65 F.2d 360 at 361 (2d Cir. 1933).

This judicial record could not be modified by extrinsic evidence.

Moore v. Harjo, 144 F.2d 318 at 321, et seq. (10th Cir. 1944).

Nor could it be contradicted by extrinsic evidence that something different was intended.

In re Crosby Stores, 65 F.2d 360 at 361 (2d Cir. 1933);

Louisiana Land & Exp. Co. v. Parish of Jefferson, 59 F.Supp. 260 at 266 (E.D.La. 1945).

Also, inasmuch as Lawrence relied on this judicial record to prove its liability to Defense Supplies Corporation, it could not impeach the recitals of the Judgment and the Findings of Fact and Conclusions of Law.

Barnsdall Refining Corporation v. Birnamwood Oil Co., 32 F.Supp. 308 at 313 (E.D. Wis. 1940).

The evidence adduced at the trial of the complaint of Defense Supplies Corporation was the only evidence offered at the trial of the cross-claims to show that Capitol

incurred any liability to Lawrence. Consequently, the exclusion of this evidence results in a clear failure on the part of Lawrence to establish any claim for relief. Inasmuch as objection to this evidence was made before the trial at the pretrial conference (R. 255 in 13840), during the trial (R. 315 et seq. in 13840) and after the trial but before judgment (R. 19 et seq. in 13840), Lawrence can claim no surprise at an adverse ruling on this appeal.

V. LAWRENCE WAREHOUSE COMPANY FAILED TO PROVE ANY LOSS OR DAMAGE.

Judgment was entered against Capitol in the principal sum of $68,294.15 together with interest in the amount of $7,975.58. Apparently this represents the amount paid by Lawrence to Reconstruction Finance Corporation, $58,859.90 (R. 123, 129 in 13840) plus attorneys' fees and costs of Lawrence, $9,439.25 (R. 123-124 in 13840). Lawrence, however, in introducing evidence of payment to Reconstruction Finance Corporation expressly limited that evidence to the cross-claims in Action No. 30473. Counsel stated (R. 343 in 13840):

> "Mr. Garrison [counsel for Lawrence]. Another item of stipulation, and then that is all of the evidence that we desire to offer. Counsel has agreed to stipulate that the judgment that was rendered in favor of the Reconstruction Finance Corporation against the defendants in 23171, Lawrence Warehouse Company, Capitol Chevrolet Company and McGrew, was paid upon December 1, 1951 by the Lawrence Warehouse Company, and that stipulation applies to both cases.

Mr. Clark [counsel for Capitol]. So stipulated.

Mr. Archer [counsel for Capitol]. So stipulated, Your Honor, although I would object to its admission in the first case as irrelevant.

Mr. Garrison. I am incorrect. It should apply only to the second case, because that is the case in which it was rendered.

The Court. Very well.

Mr. Garrison. That is the evidence on behalf of the cross-claimant.

I might say for the record that the amount of that judgment was $58,859.90."

Furthermore, Lawrence offered no evidence in this action that the judgment against it in favor of Reconstruction Finance Corporation in Action No. 30473 was based on the judgment against Lawrence in favor of Defense Supplies Corporation. If under some rule of law not apparent to appellant this fact could be judicially noticed, the court must also so notice that the judgment in Action No. 30473 against Lawrence in favor of Reconstruction Finance Corporation was not final at the time it was paid because the judgment expressly states that the cross-claims of Lawrence were still pending (R. 81 et seq.) and no determination or direction for entry under Rule 54(b) were made. Inasmuch as the claims of Reconstruction Finance Corporation in Action No. 30473 against James A. Kenyon and Capitol Chevrolet Co. have never been adjudicated, the judgment against Lawrence in favor of Reconstruction Finance Corporation is not even final at present but is "subject to revision at any time" (Rule 54(b), F.R.C.P.). Therefore, the payment to Reconstruction Finance Corporation by Lawrence was a voluntary

act not connected, in so far as the evidence is concerned, with the judgment against Lawrence in favor of Defense Supplies Corporation.

Also judicial notice would show that on February 11, 1953, a judgment was filed dismissing Lawrence's claim against Capitol in No. 30473 (R. 133 in 13840). This was a dismissal on the merits (Rule 41(b), F.R.C.P.), and the judgment has become final (R. 179 in 13840). Lawrence being a party to that judgment from which no appeal has been taken, it is estopped to assert Capitol's liability to Lawrence.

CONCLUSION.

If this appeal is not dismissed, appellant submits that the judgment appealed from must be reversed with directions to enter judgment for appellant. The undisputed evidence considered by the District Court shows that Lawrence undertook to provide watchmen to safeguard the Ice Palace and failed in the performance of this duty. The Findings of Fact, Conclusions of Law and Judgment rendered on the trial of the complaint of Defense Supplies Corporation estop Lawrence from contending otherwise. In addition, the evidence adduced at the trial of the complaint of Defense Supplies Corporation, regardless of its import, should not have been considered at the trial of the cross-claims on the issue of Capitol's liability to Lawrence. The exclusion of this evidence results in a failure of Lawrence to prove its case. For the foregoing reasons the judgment in favor of Lawrence

against Capitol must be reversed with directions to enter judgment for appellant.

Dated, San Francisco, California,
September 22, 1953.

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